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Federal Civil Procedure—Class Actions—MULTIPLE PLAINTIFFS WITH SEPARATE AND DISTINCT CLAIMS MUST EACH SATISFY THE JURISDICTIONAL AMOUNT—*Zahn v. International Paper Co.*, 94 S. Ct. 506 (1973).

The genesis of the modern class action, the bill of peace, was developed by the Court of Chancery to facilitate the adjudication of disputes involving common questions and multiple parties in a single suit.¹ In the United States, before 1938, class actions were available in the federal court for equitable relief when the action involved members of a class so large that it was impractical to join them.² However, the 1938 adoption of original

1. At early common law no procedure resembling the class action existed. However, the two party concept was deviated from when the parties had close interests, for example, when they were joint obligees. CHAFEE, *SOME PROBLEMS OF EQUITY* 200-01 (1950).

Lord Eldon is credited with the later development of the equitable bill of peace. *See Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805), Lord Eldon's opinion beginning at 1158. Judgments rendered on the bill of peace device were binding on the entire group. CHAFEE, *supra*.

See, e.g., How v. Tenants of Broomsgrove, 23 Eng. Rep. 277 (Ch. 1681), in which the tenants of the manor were allowed to maintain an action against the lord of the manor after he had appropriated some of the village's common land for his own purposes. The court allowed representatives of manor tenants who shared a common interest to maintain a single action and thereby eliminated the necessity of trying common questions in separate actions.

If the court of chancery determined that the group was so large so as to make joinder impossible or impracticable, it would allow the action to be maintained by or brought against some members on behalf of the group. *Adair v. New River Co.*, 32 Eng. Rep. 1153, 1158-59 (Ch. 1805). *See WALSH, EQUITY* § 118 at 553-60 (1930); WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE: Civil* § 1751 at 503-05 (1972); Z. Chafee, *Bills of Peace With Multiple Parties*, 45 HARV. L. REV. 1297 (1932).

It was stated by the court in *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948):

The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.

See generally Developments in the Law—Multiparty Litigation in the Federal Courts, 71 HARV. L. REV. 874, 928 (1958).

2. Because of their origins in the English bill of peace, class suits in the United States were of equitable cognizance only. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Smith v. Swormstedt*, 57 U.S. (16 How.) 137 (1853). This was true also because the law courts were not well adapted to protect the rights of unknown, unnamed or nonparticipating persons. WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE: Civil* § 1751 at 506-07 (1972). *See Christopher v. Brusselback*, 302 U.S. 500 (1938); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917).

The Federal Equity Rules allowed class suits in federal courts. The earliest Equity Rule, Rule 48 stated:

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in

Rule 23³ made the class action available for legal as well as equitable relief.⁴

Rule 23 divided class actions into three categories, "true" "hybrid" and "spurious",⁵ and defined them in terms of jural relationships.⁶ The "spurious" classification⁷ was viewed as a permissive joinder device⁸ in which

its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all absent parties. WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE: Civil* § 1751 at 508 n.22 (1972).

The later Equity Rule, Rule 38 stated:

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole. 226 U.S. 659 (1912).

3. In 1934 the Rules Enabling Act, 28 U.S.C. § 2072 (1970), paved the way for the Federal Rules of Civil Procedure. Original Rule 23 (a) reads as follows in the pertinent part:

REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is:

(1) Joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) Several, and the object of the action is the adjudication of claims which do or may effect specific property involved in the action; or

(3) Several, and there is common question of law or fact affecting the several rights and common relief is sought. 308 U.S. 653, 689 (1939). Original Rule 23 was an attempt to encourage greater use of class actions.

See NOTES OF ADVISORY COMMITTEE ON RULES, APP. R. CIV. P. 28 U.S.C. at 7763 (1970). For additional background on the original rule see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937); Moore and Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307 (1937); Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34 (1937).

4. See *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948).

5. The terms "true," "hybrid" and "spurious" correspond to (1), (2) and (3) respectively of original Rule 23(a). *Supra* note 3.

The true class actions were those in which the rights of the different class members were common and undivided. . . . [S]purious class actions, . . . were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact. *Snyder v. Harris*, 394 U.S. 332, 335 (1969).

Professor Moore divided the rule into these categories prior to its adoption. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937). These designations became part of the law. NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES, FED. R. CIV. P. 23, 28 U.S.C. at 7765 (1970).

6. WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE: Civil* § 1752 at 511 (1972).

7. Its use made litigation more efficient by avoiding multiplicity of suits. *Knowles v. War Damage Corp.*, 171 F.2d 15, 18 (D.C. Cir. 1948). See also *Weeks v. Bareco Oil Co.*, 125 F.2d

parties with separate and distinct claims involving common questions of law or fact were allowed to litigate in a single suit.⁹ In contrast, amended Rule 23,¹⁰ adopted in 1966, eliminated the "true," "hybrid" and "spurious"

84, 88, 91 (7th Cir. 1941); Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 51 (1937).

8. There was no jural relationship between the members of the class. They had not taken steps to create legal relationships among themselves and the class was formed solely by the presence of common questions of law or fact—the right and liability of each was distinct. 3 B.J. MOORE, FEDERAL PRACTICE ¶ 23.10(i), at 2601-03 (2d ed. 1969).

Thus in every case where parties could have been joined as a "spurious" class under original Rule 23(a)(3), it would have been possible to use Rule 20(a) (permissive joinder). WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1752 at 526 (1972). See, e.g., *Carroll v. American Fed'n of Musicians*, 372 F.2d 155 (2d Cir. 1967), *rev'd on other grounds* 391 U.S. 99 (1968); *Apparel Creators v. Wieder of California, Inc.*, 162 F.2d 893 (2d Cir. 1947), *cert. denied* 332 U.S. 816 (1947); *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88-89 n.5 (7th Cir. 1941); *Smith v. Abbate*, 201 F. Supp. 105 S.D.N.Y. 1971; *Shipley v. Pittsburgh & L.E.R. Co.*, 70 F. Supp. 870, 874 (W.D. Pa. 1947). *But see* *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 589 (10th Cir. 1961) *noted in* 14 SYRACUSE L. REV. 127 (1962); 76 HARV. L. REV. 1675 (1962). See also Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 702-10 (1941).

9. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1756 at 525 (1972).

10. FED. R. CIV. P. 23:

(a) **Prerequisites to a Class Action.**

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.**

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate

designations which the courts had so much difficulty applying,¹¹ and replaced them with functionally described categories.¹² In spite of these changes, application of Rule 23 has been referred to as "extremely complicated"¹³ and tending "to ask more questions than it answers."¹⁴

In *Zahn v. International Paper Co.*,¹⁵ the United States Supreme Court was confronted with the question of whether each plaintiff in a federal class action suit must satisfy the \$10,000 jurisdictional requirement of 28 U.S.C. § 1332¹⁶ when the claims are separate and distinct—"spurious" under original Rule 23. The petitioners filing a class action complaint under Rule 23(b)(3)¹⁷ based upon diversity of citizenship, sought damages on behalf of themselves and 200 property owners fronting Lake Champlain in Orwell, Vermont. Petitioners alleged that the International Paper Co. permitted discharges from its New York pulp and paper plant to flow into Ticonderoga Creek and from there into Lake Champlain, polluting the water and damaging the value and utility of the surrounding properties.¹⁸ While each of the named petitioners in the suit had claims exceeding \$10,000, not all members of the class met that jurisdictional amount.¹⁹ The Court held that

actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

11. WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE: Civil* § 1752 at 512 (1972). Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 822 (1946).

The terms "joint," "common" etc. which were used as the basis for original Rule 23 (*supra* note 3) were in practice obscure and uncertain. NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES, FED. R. CIV. P. 23, 28 U.S.C. at 7765 (1970). See also Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Simeone, *Procedure Problems of Class Suits*, 60 MICH. L. REV. 905 (1962).

12. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 72, at 311 (2d ed. 1970). See note 10 *supra*.

13. Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 552, 563 (1966).

14. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967).

15. 53 F.R.D. 430 (D. Vt. 1971), *aff'd by a divided court* 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 94 S. Ct. 505 (1973) (Brennan, Douglas & Marshall JJ., dissenting).

16. 28 U.S.C. § 1332 (1970) states in the pertinent part:

Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of \$10,000, exclusive of interests and costs, and is between—

(1) citizens of different States; . . .

It is Congressional policy to relieve congestion in the federal courts by using the jurisdictional amount requirements. *Young Spring & Wire Corp. v. Guarantee & Liab. Ins. Co.*, 220 F. Supp. 222 (W.D. Mo. 1963).

17. For text of Rule 23 (b)(3) see note 10 *supra*.

18. 94 S. Ct. at 507.

19. "The District Court was convinced 'to a legal certainty' that not every individual owner

each member of the class must satisfy the \$10,000 amount requirement and that any member not meeting it must be dismissed from the suit.²⁰

Prior to the 1966 revision of Rule 23, the combining or aggregation of claims in "spurious" type class actions to satisfy the jurisdictional amount requirement was not allowed.²¹ After the 1966 revision²² there was a split of authority on this issue.²³ The Supreme Court in *Snyder v. Harris*,²⁴ a case

in the class had suffered damages in excess of \$10,000." *Id.*

20. *Id.* at 512.

21. *Pinel v. Pinel*, 240 U.S. 594 (1916):

The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common or undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Id.* at 596.

See also *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911); *Woodside v. Beckham*, 216 U.S. 117 (1910); *Waite v. Santa Cruz*, 184, U.S. 302, 328-29 (1902); *Wheless v. St. Louis*, 180 U.S. 379, 383 (1901); *Bernards Township v. Stebbins*, 109 U.S. 341, 355 (1883); *cf. Clay v. Field*, 138 U.S. 464, 479-80 (1890); *Russell v. Stansell*, 105 U.S. 303 (1881); *Seaver v. Bigelows*, 72 U.S. (5 Wall.) 208 (1866); *Stratton v. Jarvis*, 33 U.S. (8 Pet.) 3 (1834).

Where aggregation was allowed, the cases could be classed under the "true" classification. See, e.g., *Grand Rapids Furniture Co. v. Grand Rapids Furniture Co.*, 127 F.2d 245 (7th Cir. 1942), where plaintiffs had an undivided interest though separate as between themselves, the amount of their joint claims was the test of jurisdiction; *Phoenix Ins. Co. v. Woolsey*, 287 F.2d 531, 533 (10th Cir. 1961); *Century Ins. Co. v. Mooney*, 241 F.2d 910 (10th Cir. 1957); *Phillips Petroleum Co. v. Taylor*, 115 F.2d 726, 728 (5th Cir. 1911).

Where aggregation was not allowed, cases could be classed under "hybrid" or "spurious." See, e.g., *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Eagle Star Ins. Co. v. Maltes*, 313 F.2d 778 (5th Cir. 1963); *Alfonso v. Hillsborough County Aviation Authority*, 308 F.2d 724 (5th Cir. 1962); *Troup v. McCart*, 238 F.2d 289 (5th Cir. 1956).

Thus, it was held that the suit should be dismissed as to those who do not meet the jurisdictional amount. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 590 (1939). See also *Stewart v. Dunham*, 115 U.S. 61, 64-65 (1885); *Bernards Township v. Stebbins*, 109 U.S. 341, 355 (1883).

22. Note 10 *supra*.

23. In the companion case to *Snyder*, the lower court allowed aggregation in a case which prior to 1966 would not have been classified as a "true" class suit. Noting that this was an expansion of federal jurisdiction, the court said that by discarding the old classifications in new Rule 23 and then using them "to allow or defeat aggregation would render the rule sterile in that regard." *Gas Service Co. v. Coburn*, 389 F.2d 831, 834 (10th Cir. 1968), *rev'd*, 394 U.S. 332 (1969). See *Collins v. Bolton*, 287 F. Supp. 393, 398-99 (N.D. Ill. 1968); *Booth v. General Dynamics Corp.*, 264 F. Supp. 465, 470-71 (N.D. Ill. 1967).

The other line of decisions as represented by *Alvarez v. Pan American Life Ins. Co.* held that the 1966 amendment to Rule 23 had no effect on the doctrine of aggregation and to hold otherwise would expand federal jurisdiction sub silentio. 375 F.2d 992, 995 (5th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967). See also *Hartman v. Secretary of the Dep't of HUD*, 294 F. Supp. 794 (D. Mass. 1968); *Nelville v. Delta Ins. Co.*, 45 F.R.D. 345 (D. Minn. 1968); *Pomierski v. W.R. Grace & Co.*, 282 F. Supp. 385 (N.D. Ill. 1967).

The Court in *Snyder v. Harris* decided this issue. It reasoned that the doctrine that separate and distinct claims cannot be aggregated is not based upon the categories of original Rule 23, but rather upon the Court's interpretation of the statutory phrase "matter in contro-

in which none of the class members satisfied the amount in controversy requirement, ruled that aggregation was not permissible, but left open the narrower question of whether each member in a class must satisfy the \$10,000 requirement if at least one does fulfill it.²⁵

Mr. Justice White, delivering the majority opinion in *Zahn*, stated that the rule that each plaintiff in a 23(b)(3) class action must satisfy the jurisdictional amount requirement²⁶ is rooted in cases dating from 1832.²⁷ He said that in the "spurious" action prior to 1966, it was necessary for each claimant to meet the jurisdictional requirements²⁸ and that *Snyder* had been an unmistakable rejection of the notion that the 1966 amendment to Rule 23 was intended to or did effectuate any change in the jurisdictional amount requirement.²⁹ The Court held the prohibition against aggregation not to be based on Rule 23, but rather on the long standing construction of the statutory phrase "matter in controversy" of

versy," and "[a]ny change in the Rules that did purport to effect a change in the definition of 'matter in controversy' would clearly conflict with the command of Rule 82 that '[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . .'" 394 U.S. 332, 336-37 (1969).

24. 394 U.S. 332 (1969), noted in 22 FLA. L. REV. 154 (1969); 83 HARV. L. REV. 202 (1967); 58 KY. L.J. 403 (1970). This case would have been designated "spurious" under original Rule 23. See note 5 *supra*.

25. The lower courts were not in agreement on this issue. Some cases held that each member of the class must satisfy the jurisdictional amount requirement of 28 U.S.C. § 1332. See, e.g., *Alvarez v. Pan Am. Life Ins. Co.*, 375 F.2d 993 (5th Cir. 1967), cert. denied, 389 U.S. 827 (1967); *Hartman v. Secretary of the Dep't of HUD*, 294 F. Supp. 794 (D. Mass. 1968). But see *Lesch v. Chicago & E. Ill. R.R.*, 279 F. Supp. 908 (N.D. Ill. 1968).

26. 94 S. Ct. at 508.

27. In *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143 (1834) the Court reasoned that none of the plaintiffs had an interest in the other's claim and would be unaffected by it. "Each is to stand or fall by the merits of his own claim, and is unaffected by those of his co-libellants. The defence [*sic*] which is good against one seaman may be wholly inapplicable to another." *Id.* at 146.

Justice White specifically cites *Troy v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911) which said:

When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. 94 S. Ct. at 508.

For other cases see note 21 *supra*.

28. Dismissal of those claimants who do not meet the jurisdictional amount is the rule. See note 21 *supra*.

Justice White cited Judge Frank's opinion on original Rule 23 (a)(3) saying that "spurious" class suits are "in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." *Steele v. Guaranty Trust*, 164 F.2d 387, 388 (2d Cir. 1947) cited in *Zahn*, 94 S. Ct. at 509.

29. 94 S. Ct. at 511.

§1332,³⁰ a phrase which if construed differently "would undermine the purpose and intent of Congress providing that plaintiffs in diversity cases must present claims in excess of the jurisdictional amount."³¹ The Court concluded that if the legislature had wished to change the jurisdictional amount requirement when amending Rule 23, it would surely have included an express statement to that effect in the amendment or in the official commentaries.³² While rejecting the notion that Rule 23 controlled the meaning of "amount in controversy," the *Snyder* and *Zahn* decisions, in essence, revived the "true," "hybrid" and "spurious" classifications since they must continue to be used in determining whether jurisdiction exists under §1332.³³

As a result of *Zahn*, plaintiffs not meeting the jurisdictional amount must bring the class action in state courts which inevitably results in duplicative litigation if those having the requisite amount of damages do qualify as a class in the federal court.³⁴ Since class actions are discouraged in many jurisdictions, there is no guarantee that the state courts will be receptive to such suits.³⁵ In addition to bringing their action in state courts, a number of plaintiffs might form an unincorporated association and bring their separate and distinct actions under Rule 23.2, thus eliminating the "amount in controversy" problem since this is considered a "true" class

30. For text of 28 U.S.C. § 1332 (1970), see note 16 *supra*.

31. 94 S. Ct. at 512.

In *Snyder* it was held that the meaning of the "matter in controversy" would have to be changed in order to have come to a different decision. See note 23 *supra*.

32. 94 S. Ct. at 512.

Dissenting opinions filed in the Second Circuit and the Supreme Court argued that the usefulness of Rule 23(b)(3) could be retained if the Court would recognize the use of ancillary jurisdiction to allow plaintiffs not having the requisite amount of damages to enter the suit. Dissenting opinions filed in *Zahn v. International Paper Co.*, 469 F.2d 1033, 1036 (2d Cir. 1972) by Circuit Judge Timbers. Dissenting opinion filed in *Zahn v. International Paper Co.*, 94 S. Ct. 505, 512 (1973) by Justice Brennan joined by Justices Douglas and Marshall. See 73 COLUM. L. REV. 359, 364-70 (1973).

33. One commentator noted "[t]hat the old conceptual tests of 'joint,' 'common' and 'several,' deliberately discarded in the new rule in favor of more functional and more meaningful provisions, continue to control in determining whether jurisdiction exists." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 72, at 315 (2d ed. 1970).

34. If there are class members with the requisite damages of \$10,000, the number of plaintiffs may nevertheless be small, and therefore the requirement of 23(a)(1) that "the class (be) so numerous that joinder of all members is impracticable," will seldom be met. Rule 23 note 10 *supra*. Therefore, when the plaintiff's allegation of numerosity is challenged by the defendant, the class size will have to be determined by sending notice to all possible members and those having the \$10,000 damage claim will have to step forward and identify themselves. 73 COLUM. L. REV. 359, 371 (1973).

35. *Zahn v. International Paper Co.*, 469 F.2d 1033, 1039-40 (2d Cir. 1972) (Timbers, J., dissenting). See generally 67 C.J.S. *Parties* § 13 (1955).

suit under former Rule 23 and aggregation is allowed.³⁶ Application of pendent jurisdiction, which is a particularized form of ancillary jurisdiction,³⁷ in very limited situations may be a means of avoiding the *Zahn* holding, but in such a case each plaintiff would already have to be in federal court on one sufficient claim in order to bring in the insufficient one.³⁸ Some federal questions such as abridgement of civil rights and cases arising under acts of Congress regulating commerce may be brought under statutes with no "matter in controversy" requirements. Thus in such situations, class action suits will not be affected by the *Zahn* holding.³⁹

Zahn and *Snyder*, while relieving the overloaded federal courts, will have an impact on environmentalists and others who must rely on the 23(b)(3) class action because the polluter, for example, can now avoid much of the great expense of litigation and environmental control, knowing that members of the public cannot generally afford individual suits when costs far exceed damages suffered.⁴⁰ Congress should act to change the meaning of "matter in controversy" of 28 U.S.C. §1332 to the following:

[I]n any case permitted to be maintained as a class action under the Federal Rules of Civil Procedure, the aggregate claims for or against all members of the class should be regarded as the amount in controversy.⁴¹

Until *Zahn* is overturned or Congress acts, the rule as to class actions is

36. *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 148 F.2d 403 (4th Cir. 1945); 3 B.J. MOORE, FEDERAL PRACTICE ¶ 23.2.01, at 23.2.2 (2d ed. 1969).

Federal Rule of Civil Procedure 23.2:

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members

There are limitations to this method due to the political and financial problems in organizing such an unincorporated association. Comment, *Civil Procedure—Federal Rule 23—Aggregation of Claims*, 58 Ky. L.J. 403, 407 (1970).

37. *Zahn v. International Paper Co.*, 469 F.2d. 1033, 1037 (2d Cir. 1972) (dissenting opinion).

38. This maneuver is to be distinguished from that rejected in *Zahn* where absent class members had no claim at all which could be heard in federal court, by the fact that in this pendent situation the entire class would be in federal court on the basis of their first claim. The insufficient claim would in the courts discretion be pendent to the first. 61 GEO. L.J. 1327, 1338 (1973). See, e.g., *Almenares v. Wyman*, 453 F.2d 1075, 1083 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972); *Fisher v. Weaver*, 55 F.R.D. 454, 459 (N.D. Ill. 1972); *Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354, 355 (N.D. Ohio 1969).

39. 61 GEO. L.J. 1327, 1338 n.79 (1973).

40. Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum*, 22 AM. U.L. REV. 79, 98-99 (1972), citing at n.131, Lamm & Davidson, *Environmental Class Actions Seeking Damages*, 16 ROCKY MT. MINERAL L. INST. 59, 88 (1971).

41. Wright, *Class Actions*, 47 F.R.D. 169, 184 (1969).

that where claims are separate and distinct "one plaintiff may not ride in on another's coattails."⁴²

D.L.H.

42. Zahn v. International Paper Co., 469 F.2d 1033, 1035 (2d Cir. 1972).